54

1952.

File No. O.B.C.S.Rs./52

P21E

Legal Deptt.

A **BRANCH**

Subject:— Opinions under the Bombay Civil Services Rules.

O.C.S.Rs./52

200-A

C O N T E N T S.

Legal Department File No. O. B.C.S. Rs./52.

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Office of the R.L.A.

Rule 749 of the Bombay Civil ~~Serives~~ Services Rules Provides that Government may extend the application of the provisions of Rule 748 to a Government servant who is disabled by injury accidentally incurred in or in consequece of the due performance of his official duties, or in ~~xxxxxxx~~ ~~xxx~~ consequence of his official position, or by illness incurred in the performance of any particular duty which has the effect of increasing his liability to illness or injury beyond the ordinary risk attaching to the civil post which he holds. This provision contemplates two kinds of disabilities: (1) disability by injury accidentally incurred in or in consequence of the due performance of his official duties or in consequence of his official position and (2) disability incurred by illness in the performanse of any particular ~~x~~ duty. The latter disability is further governed by the clause "which has the effect of increasing his liability to illness or injury beyond the ordinary risk attaching to the civil post which he holds". Illness under this provision may be illness simpliciter or illness arising out of injury sustained in the performance of any particular duty. As the rule stands if the injury is accidentally incurred in or in consequence of the due performance of a Government servant's official duties or in consequence of his official position, and if he is disabled by such injury, it appears that such Government servant would be entitled to the concession provided for in Rule ~~748~~ 749 read with Rule 748. The ground urged by F.D. that in order to entitle a Government servant to a disability leave it is not enough that he was on official duty when he sustained the injuries but under the Bombay Civil Services Rule 749 another condition is also necessary to the effect that the particular duty must have the effect

of increasing the officer's liability to illness or injury beyond the ordinary risk attaching to the civil post which he holds, is not quite correct; and the plain reading of rule ₹ 749 would not sustain such interpretation of that rule. In the circumstances, the H.L.A. sees no reason to ~~reconsidex~~ reconsider the Additional Secretary's opinion No. 16384, dated the 16th October 1951.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 1092, dated the 23rd January 1952.

EVI. 18/6.

Office of the R.L.A.

"Gratuity" is a lump payment of money in recognition of past services, whereas "pension" is a periodical payment made in consideration of ~~past~~ services. Moreover, according to the definition in the Bombay Civil Services Rules the term "pension" includes a gratuity. A gratuity and a pension are, therefore, of the same nature. In view of this position the Auditor General's ruling will equally apply to gratuities also and it would not be feasible to make receveries of the amounts ~~payable to~~ ~~pensioners~~, overpaid from the gratuity-amount payable to the pensioners.

Sd/- P.M. LAD,
13/2
Remembrancer of Legal Affairs.

U.R. to H.D., No. 2457-Confl. dated the 14th February 1952

EVY. 18/6.

Office of the R.L.A.

Discharge from Service Whether it would affect pending prosecution.-

The Legal Department has been requested to advise with regard to the presumption made by the Director of Education in his letter dated the 29th February 1952 at page 89 of the Correspondence section. In this letter, the Director has suggested that instead of keeping Shri Telang, clerk, Govindrao High School, Ichalkaranji, under suspension he should be discharged from service with effect from 1st August 1949, the date of merger of the State and that he should be paid subsistance allowance due to him upto the date of the merger in accordance with the Rules of the former Kolhapur State. The Director presumes that such a discharge from service will not affect the criminal proceedings launched against Shri Telang in respect of misappropriation of Government money and the R.L.A. is requested to advise in the matter.

2. Discharge from service will not affect the pending criminal proceedings (cf. Additional Secretary's opinion No. 736-Confl. dated the 27th July 1951); but Education Department may consider whether it would be legally feasible to discharge Shri Telang with retrospective effect as proposed. Attention ~~xx~~ of Education Department in this connection is invited to R.L.A's opinion No. 6123, dated the 1st July 1948 (Digest of Opinions, page 97, Part I) and also to Rule II of Government Resolution, Political and Services Department No. 2735/46 dated the 30th May 1951 which requires~~xx~~ a month's notice before a servant is discharged.

Sd/- P.M. LAD, 5/4
Remembrancer of Legal Affairs.

U.R. to E.D., No. 331-Confl, dated the 8th April 1952.

EVY. 18/6.

Legal Department.

The relationship between Government and their servants is that of master and servant and is governed by the Civil Services Rules." Resignation in law is notice to quit and the Bombay Civil Service Rules do not provide any conditions subject to which such notice can be given by a Government servant and the date from which it ~~can~~ becomes effective. It is true that under the constitution every Government servant holds his office at the pleasure of Government and subject to the limitations prescribed by article 311 Government ~~and subject~~ can terminate the services of a servant. No corresponding right vests in a Government servant to quit at will and in the absence of any condition imposed by the Bombay Civil service Rules, it would be held that a servant desiring to resign must give reasonable notice. But omission to give such notice would make him liable to dismissal and to all the consequences of such dismissal but would not compel him to continue in the service of Government, if he does not desire to do so. According to the general principles of law a contract of service cannot be specifically enforced by a suit. It will, therefore, be desirable to consider the question of the amendment of the Bombay Civil Service Rules to lay down conditions subject to which notice to quit would be effective.

Sd/- 7/4

Additional Secretary to Government.

U.R. to P. & S.D., No. 5132, dated the 4th April 1952.

EVY. 18/6.

Office of the R.L.A.

It appears that servants of merged States who are discharged on account of their services not being wanted are given a special compensation gratuity under rule IV(b) of the Rules printed in G.R., P. & S.D. No. 2735/46, dated the 18th July 1949. Secretary, F.D. considers that this compensation not being paid on account of the premature termination of their services, would not be of the same nature as that of pension and therefore, there would be no objection to recovering the Government dues from that amount. This view is not however entirely correct. Though special compensation gratuity is not payable in consideration of services rendered by a Government servant, it would be seen that it takes into consideration the probable period of service which the Government servant could have rendered had he not been deprived of the opportunity for rendering it. Considered in this light there would appear to be no ground for distinguishing the nature of special compensation gratuity from that of pension which is paid in consideration of past services. The view expressed in the previous opinion would therefore be equally applicable even to amounts of special compensation gratuity.

Sd/- P.M. LAD,
1414
Remembrancer of Legal Affairs.

U.R. to F.D., No. 5625, dated the 15th April 1952.

EVY. 18/6.

Office of the R.L.A.

The view taken by the P. & S.D. in para. 2 of their note at pp. 3-4 ante is correct. In view of the definition of "Government servant" in rule 5 of the Bombay Civil Services Conduct, Discipline and Appeal Rules, those Rules would not be applicable to a part-time Government servant.

2. In the case of Law Officers of Government who are also part-time Government servants, a rule has been made prohibiting them from taking part in politics and also prohibiting them from being members of Local Bodies without the permission of Government. There is no comprehensive code of conduct applicable to all kinds of part-time Government servants. However, part-time Government servants are generally expected to confer to the code of conduct contained in the Bombay Civil Services Conduct, Discipline and Appeal Rules, as far as it may be applicable to them.

3. The problems of conduct pertaining to different kinds of Government servants may not be the same. It is, therefore, necessary first to ascertain from the various Administrative Departments whether the Bombay Civil Services Conduct, Discipline and Appeal Rules should be applied to part-time Government servants under their control, and if so, whether such rule should be applied with or without modifications and whether any fresh Rules relating to their special cases need be framed. Upon that information becoming available, the question of the application of the Bombay Civil Services Conduct, Discipline and Appeal Rules may be taken up for consideration.

Sd/- P.M. LAD,
6/5
Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 7225, dated 7th May 1952.

Office of the R.L.A.

Undertaking to serve Government for five years.

penalty clause for breach of.

No penalty clause can now be inserted in the undertaking executed by the candidates. If they are agreeable, fresh undertakings with such penalty clause should be taken from them. If they are not agreeable, their liability to serve Government for a period of five years can be enforced in a court of law by way of damages.

Sd/- P.M. LAD,
26/6
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 10685, dated the 27th June 1952.

EVZ. 18/6.

Office of the R.L.A.

It is true that under paragraph 2 of rule 7 of the rules framed by the Collector of Kaira in exercise of the powers delegated under General Department Notification No. S 174/10(a) dated the 8th November 1941, punishment of removal from service can be inflicted only after holding a departmental inquiry which shall be held in accordance with the rules for holding departmental inquiries laid down in the Bombay Civil Services Conduct, Discipline and Appeal Rules, etc. Admittedly no such inquiry was held in the present case before the Secretary Shri Gamansinh M. Rathod was removed from his office. Ordinarily he would, therefore, have been entitled to claim damages for wrongful removal from service (see Gokak Municipality v. Rajaram Shridhar Kukkarni, 42 B.L.R. 886 at p. 892). However, Shri Gamansinh was removed from service in October 1948 and since then he has taken no action against the Panchayat. Under section 111(3) every such action shall be commenced within six months after the accrual of the cause of action and not afterwards. In the present case the cause of action for damages accrued in October 1948. In the circumstances, it appears that Shri Gamansinh's claim, if any, for damages is clearly time barred. No action on the part of Government appears, therefore, called for.

Sd/- P.M. LAD,
12/7
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P. H. D., No. 11672, dated the 15th July 1952.

EVY. 18/6.

Office of the R.L.A.

Unpaid subsistance allowance.

Appropriation of R.L.A's opinion No. 14858, dated 18th September 1951.

Subsistence allowance payable to a Government servant under suspension is primarily intended for his maintenance during such period and while he is under suspension, the payment of this amount cannot be withheld for any reason nor can this allowance be appropriated by Government towards satisfaction of its dues from such servant. But if the subsistence allowance is not paid for any reason to such servant during the period of his suspension and if it is lying with Government even after such suspension is over there appears no legal objection to Government appropriating that amount towards the satisfaction of its dues on account of defalcations made by such servant while in service. In the present case Shri Maniram was suspended for misappropriation of Government money with effect from 26th March 1949, and was subsequently discharged by the Collector on 26th May 1949. A sum of Rs. 185-5-0 being the amount due to him on account of his subsistence and dearness allowances during the period of his pay and allowances prior to his suspension and suspension is lying with Government. In these circumstances, there appears no legal objection to appropriating this amount towards the satisfaction of the dues of Government on account of misappropriation of Government property. R.L.A's opinion No. 14858-Confl., dated 18th September 1951 will apply to the present case.

SD/- P.M. LAD,
4/8
Remembrancer of Legal Affairs.

U.R. to R.H.D., No. 766-Confl., dated the 4th August 1952.

EVI. 18/6.

Office of the R.L.A.

The view taken by P. & G.D. is correct. A part-time Government servant being required to devote a part of his time to Government work cannot be required to work over time nor to do any other work for which he is not employed.

Sd/- P.M. LAD,
418
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 12972, dated the 6th August 1952.

EVY. 18/6.

Office of the R.L.A.

It appears that leave has been granted to one Shri Vengurlenkar by the Prant Officer under a delegated authority and the Collector has cancelled that leave. The question raised for the R.L.A's a consideration is whether the order of the Collector cancelling the Prant Officer's order is correct.

2. As pointed out by the R.L.A. in his last opinion No. 18402 dated the 19th November 1951, power to grant leave to a non-gazetted Government servant vests in the Collector under Rule 10 of the Bombay Civil Services Recruitment Rules read with rule 623 of the Bombay Civil Services Rules. It appears that that power of the Collector has been delegated to the Prant Officer. It is not known whether that delegation is absolute or conditional. If the delegation is absolute, reserving no power to the Collector to revise the order of the Prant Officer, it appears that the order passed by the Prant Officer granting leave to Shri Vengurlekar cannot be revised or cancelled by the Collector. (R.L.A's opinion No. 13823 dated 23-8-1952). R.D. may consider whether the delegation of power to the Prant Officer was conditional or absolute.

Sd/- P.M. LAD,
27/8
Remembrancer of Legal Affairs.

U.R. to R.D., No. 853-Conf1, dated the 27th August 1952.

EVY. 18/6.

Office of the R.L.A.

Resignation.

Bombay Civil Services Rules.

In Ganesh v. S.I.P. Rly., (II. Bom. L.R. P. 790), it was held that the dismissal of a servant would operat from its communication. The same principle will apply even to resignations. In the absence of anything to the contrary in the Bombay Civil Services Rules, the acceptance of Shri Joshi's resignation of his post by th Collector would be operative from its communication to Shri Joshi, i.e. from the 2nd January 1948, although the Collector ordered its acceptance with effect from the 1st January 1948. Consequently, Shri Joshi would be entitled to his pay for 1-1-1948 even though that day was a holiday and he did not work.

Sd/- P.M. LAD,
30/8
Remembrancer of Legal Affairs.

U.R. to R.D., No. 14274, dated the 3rd September 1952.

BVY. 18/6.

Office of the R.L.A.

It appears that Shri Garud was suspended from service with effect from 17th October 1949 and subsistence allowance was sanctioned to him in accordance with orders contained in Government Letter dated 5th November 1950. After consulting the R.L.A., who in his opinion No. 14858-Confl. dated the 18th September 1951, opined that the benefit of subsistence allowance under Rule 151 of the Bombay Civil Services Rules could be withdrawn during the period of his service under the District Local Board, Ahmednagar, Government issued orders that Shri Garud should not be paid any subsistence allowance for the period during which he accepted appointment under the District Local Board, Ahmednagar. His employment under the District Local Board, Ahmednagar, terminated on 19th January 1951 and he was dismissed from Government service on 19th March 1952. Shri Garud has claimed subsistence allowance for the period from 1st May 1950 to 19th March 1952. Shri Garud received Rs. 2,301-9-0 from the District Local Board, Ahmednagar, for the service rendered to it during the period of suspension. His subsistence allowance for the period from 1st May 1950 to 19th March 1952, amounts to Rs. 2,97[illegible] Finance Department considers that the fee of Rs. 2,301-9-[illegible] which Shri Garud earned for his service to the District Local Board, Ahmednagar, can be claimed by Government under Rule 351(a) of the Bombay Civil Services Rules as he accepted that job without the previous permission of Government and this amount can be adjusted against the subsistence allowance of Rs. 2,970, which is due to him. Further, the cost of cement misappropriated by him amounts to Rs. 1,500 and as he has expressed his willingness to the adjustment of this amount against the subsistence allowance payable to him, Shri Garud will have to pay now Rs. 831 in all. As,

however, the misappropriation of the cement took place while he was under the service of the House Board, it is for the Board to claim recovery from him. The H.L.A. is requested to advise on these points.

2. Rule 355(a) of the Bombay Civil Services Rules provides that a competent authority may permit a Government servant, if it be satisfied that this can be done without detriment to his official duties or responsibilities, to perform a specified service or series of services for a private person or body or for a public body etc., and to receive as remuneration therefor, if the service be material, a non-recurring or recurring fee. Rule 360 provides that when a fee is paid for work done by a Government servant during time which would otherwise be spent in the performance of his official duties, it must be credited to general revenues provided that a competent authority may, for special reasons to be recorded, direct that the whole or any part of it may be paid to the Government servant. Both these rules contemplate the earning of fee by a Government servant while he is on duty as can be seen from the underlined portion. They are not capable of being applied to the case of a Government servant under suspension and, therefore, the proposal to claim the fee of Rs. 2301-9-0 earned by Shri Garud for his service to the District Local Board, Ahmednagar, would not appear feasible. However, as was pointed out in opinion No. 14858; dated 18th September 1951, although munder rule 151 of the Bombay Civil Services Rules subsistence allowance is payable at a prescribed rate, the intention of paying subsistence allowance to a Government Servant under suspension is to enable him to maintain himself and his family during the period of suspension. Having regard to that intention Government would be justified in making allowance for the fact that Shri Garud has earned Rs. 2,301-9-0 from

his services to the District Local Board and to direct that the subsistence allowance to be paid to him for the entire period of suspension should be reduced by that amount. This course can be justified also on the ground that to hold otherwise would be to allow Shri Garud to take advantage of his own wrong, namely, the breach of rule 21 of the Bombay Civil Services Conduct, Discipline and Appeal Rules, whereunder a Government servant who is considered to be still in service though under suspension cannot, without the previous sanction of Government, undertake any other employment. An adjustment of subsistence allowance on this basis would, therefore, be justifiable.

3. On making such adjustment there would remain a balance of Rs. 668-7-0 in his favour. It appears that Shri Garud has himself suggested to Government to adjust the price of cement misappropriated by him against the subsistence allowance payable to him. The cement misappropriated by Shri Garud was the property of the Housing Board, and consequently, the price of the cement misappropriated by him can be claimed by the Housing Board. But as Shri Garud has himself suggested the adjustment, Government may credit the balance of Rs. 668-7-0 to the Housing Board and to inform the Board that it may proceed against Shri Garud for the balance of the price of cement misappropriated by him.

Sd/- P.M. LAD,
27/8
Remembrancer of Legal Affairs.

U.R. to L. & H.D., No. 857-Conf1., dated the 28th August 1952.

RVY. 18/6.

Office of the R.L.A.

Government servants of the former Baroda State, since their absorption in the service of the Bombay State, are governed by the Bombay Civil Services Rules and other rules and orders applicable to the Government servants of the Bombay State. Consequently, the Baroda Government Servants Rules are no longer applicable to them. If any such servant holds any of the posts specified in rule 40 of the Financial Rules he can be required to furnish a security in one of the forms mentioned in those rules. It is doubtful whether the security bonds executed by such servants, while in the Baroda State Service under the Rules corresponding to the form given in Appendix I-B of the Financial Rules can be considered to be operative and effective. However, for the purposes of uniformity, it appears necessary that even those servants who had executed such bonds while in former Baroda State Service, should be asked to execute fresh bonds in the form in Appendix I-B to the Financial Rules, particularly when the contents of the bond executed under the Baroda Government Servants Rules differ materially from the contents of the form given in Appendix I-B to the Financial Rules.

Sd/- P.M. LAD,
25-9
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D., No. 15915/A, dated the 26th September 1952.

RV¹. 18/6.

Office of the R.L.A.

Subsistence allowance.

B.C.S. Rs. Rule 151 (b).

In his opinion No. 766-Confl., dated the 4th August 1952, the Remembrancer of Legal Affairs has held that subsistence allowance payable to a Government servant under suspension is primarily intended for his maintenance during such period and while he is under suspension, the payment of this amount cannot be withheld for any reason nor can this allowance be appropriated by Government towards satisfaction of its dues from such servant. By Government Resolution, Agriculture and Forests Department, No. 8137, dated the 8th December 1952 Government have directed that Shri Khedkar should be granted a subsistence allowance of Rs. 95-7-0 and also dearness allowance admissible on the subsistance allowance with effect from 29-10-1952 until further orders. Under the proviso to rule 151(b) of the Bombay Civil Services Rules it is provided that the Government servant under suspension may be granted in addition any compensatory allowance (e.g. dearness allowance, house rent allowance, etc.) of which he was in receipt on the date of suspension to such extent and subject to such conditions as the suspending authority may direct. It is clear from these provisions that dearness allowance is not subsistenace allowance and under the proviso it is open to the suspending authority direct that it shall be appropriated towards Government dues till the overpayment is wiped off.

Sd/- P.M. LAD,
24/12
Remembrancer of Legal Affairs.

U.R. to A. & F.D., No. 1440/A-Confl., dated the 24th December 1952.

EVI. 19/6.

Office of the R.L.A.

As stated in R.L.A's opinion No. 2457, dated the 14th February 1952, it would not be feasible to make recoveries of amounts overpaid, from the gratuity-amount payable to pensioners. The certificate produced by the claimant in respect of the net amount to the received by him after deductions of overpaid amount, cannot, therefore, be accepted and he should be asked to produce a certificate in respect of the whole amount of Rs. 2592/- payable as gratuity. The view taken by the Assistant Accounts Officer in para. 3 of his letter dated the 25th September 1952 is correct.

Sd/- P.M. LAD,
26/11
Remembrancer of Legal Affairs.

U.R. to P.W.D., No. 19512/A, dated the 22nd November 1952

EVI. 18/6.